2013 IL App (4th) 120928-U

NO. 4-12-0928

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 18, 2013
Carla Bender
4th District Appellate
Court, IL

DAVE McKNELLY,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
ERIC BUMGARNER,	)	No. 08L16
Defendant-Appellee.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's determination following a bench trial that plaintiff failed to establish (1) his right shoulder and cervical spine injuries were proximately caused by defendant's negligent acts or omissions during a motor vehicle accident or (2) damages resulting from the parties' collision was not against the manifest weight of the evidence.

¶ 2 Plaintiff, Dave McKnelly, filed a complaint against defendant, Eric Bumgarner, for injuries plaintiff allegedly sustained as the result of a February 2007 motor vehicle accident. Defendant admitted liability for the accident but denied that his acts were the proximate cause of plaintiff's injuries. Following a bench trial, the trial court entered judgment in favor of defendant, finding plaintiff failed to meet his burden of proof with respect to proximate cause and damages. Plaintiff appeals, arguing (1) judgment in favor of defendant was against the manifest weight of the evidence, (2) the court erred in considering prior injury evidence in the absence of

medical testimony, and (3) the court erred in excluding the medical records of plaintiff's pre-accident medical provider. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 1, 2007, the parties were involved in a motor vehicle accident in Springfield, Illinois. On January 18, 2008, plaintiff filed a complaint against defendant, alleging defendant's negligent acts or omissions caused the accident and injury to plaintiff. Specifically, plaintiff asserted as follows:

> "That as a direct and proximate result of one or more of the foregoing negligent and careless acts or omissions, the Defendant's vehicle negligently came into the Plaintiff's lane and struck the Plaintiff in the right front area causing not only the plaintiff's vehicle to be thrown from the road but caused severe and permanent injuries to his head, neck, shoulder, and back as well as mental pain and anguish. As a result of this accident the Plaintiff will also in the future be forced to expend large sums of money for medical care and expenses."

Ultimately, defendant admitted liability for the accident but denied that plaintiff sustained any injury as a result of the accident.

¶ 5 On June 13, 2012, a bench trial was conducted. Plaintiff testified, in January 2007, approximately three weeks prior to the parties' February 2007 accident, he was involved in a separate motor vehicle accident. In connection with that earlier accident, plaintiff's vehicle was rear-ended while he was waiting to make a turn. Following the January 2007 accident, plaintiff

sought emergency medical care and treatment from Dr. Sunil Bansal. Plaintiff testified he injured his left knee and lower back, and had some discomfort in his neck. Dr. Bansal sent him to physical therapy. Plaintiff stated he "was feeling a little bit better" with the physical therapy and, in his opinion, was doing well enough to be discharged from the doctor at about the time of his February 2007 accident. He testified, prior to the second accident, he "was in pretty good shape," could move around, and could perform his daily activities.

¶ 6 Plaintiff acknowledged his physical therapy after the January 2007 accident included therapy to his shoulder (he did not specify which shoulder). However, he denied any testing was performed on his shoulder prior to his second accident or that he contacted any specialist due to problems in his back or shoulders.

¶ 7 The February 2007 accident occurred when defendant, driving in the lane to the right of plaintiff, attempted to change lanes and sideswiped plaintiff's vehicle. Plaintiff testified he was driving a 2007 Dodge Durango on a five-lane road in the far left lane. He estimated his speed was 30 to 33 miles per hour and described the collision as follows:

> "I was hit by a truck driven by [defendant]. At the time of impact I was hit pretty hard. He moved me in the truck. It slammed my body forward into the left side of my truck on the side. I was able to bring the truck to a stop, roughly about mid-intersection. I stepped on the brakes pretty hard. I was very shaken up. I tried to do the best I could for an impact. You know, try to prepare your-self. I threw my arm up on the dash, and my body lurched forward ***."

Plaintiff also stated his body was "tossed around the side of the truck pretty good." He noted his right arm went up on the dash, his left knee hit his window, and his ribs on the left side of his body hit the armrest. Plaintiff stated his truck lurched to the left. He submitted photographs of his truck after the accident and identified the point of impact and scrape marks down the passenger side of his vehicle. Plaintiff estimated defendant was also traveling 30 to 33 miles per hour at the time of the collision.

¶ 8 Plaintiff testified, following the accident, he pulled into the lot of an old gas station and got out of the vehicle. His initial reaction was to be upset or angry and plaintiff noted he was driving "a brand new truck." Plaintiff then began to notice he was in very severe pain. He recalled defendant asking a couple of times whether he was injured but plaintiff stated he "was trying to shake off what had just happened." Finally, plaintiff asked for an ambulance. He recalled experiencing pain in his ribs, mid to upper back and neck area, and right shoulder.

¶ 9 At trial, defendant testified his collision with plaintiff occurred as he was changing lanes in preparation to make a left turn. He estimated he was traveling 25 miles per hour or less. Defendant described the collision as follows:

> "[A]s I began to switch lanes into the lane left of me, I did not observe this vehicle coming from the rear of my vehicle, and I continued to cross over to the other lane, at which time my left front fender area and the right front fender area of the other vehicle collided. That vehicle was going faster than my vehicle. That was the first time that I observed it was when we hit, and that vehicle continued on past me with my left front fender, causing a scraping

damage down the passenger's side of that other vehicle."

He further described the damage to plaintiff's vehicle, noting a dent by the front passenger tire was from the initial "glancing impact" but most of the other damage occurred due to the brush guard and bumper from defendant's vehicle catching the front of plaintiff's passenger door and scraping down the side of plaintiff's vehicle. Defendant also submitted photographs depicting plaintiff's vehicle following the accident.

¶ 10 Defendant testified both vehicles were brought to a stop in the intersection. He observed plaintiff exit his vehicle "in a very aggressive manner." Defendant noted plaintiff's fists were clenched and defendant thought there was a possibility they would have an altercation. He further described the incident as follows:

> "I approached [plaintiff] and asked him if he was okay. Two or three times I asked him if he was okay. He had turned his back to me and would not answer, and about the third time that I asked him, he turned around, and as he walked around me, he advised, 'Give me just a minute,' and he walked up in front of his vehicle and proceeded to make a phone call."

Defendant called 9-1-1 and testified, after plaintiff's phone call, plaintiff returned and they agreed to move the vehicles from the roadway and into a vacant lot. On cross-examination, defendant testified that, sometime after they were in the parking lot, plaintiff complained that he was getting stiff, was limping, and was holding his back. Plaintiff left the scene in an ambulance.

¶ 11 Plaintiff testified he was seen by Dr. Bansal after the February 2007 accident. He stated he complained of problems with his neck, ribs, and shoulders. Plaintiff testified he had

problems moving his shoulder, his shoulder was "clicking," and he experienced a lot of pain with lifting. More specifically, plaintiff described his left shoulder as very hard to move and stated it was difficult for him to lift and hold things. He described his right shoulder as "extremely bad" and stated he could not perform regular everyday activities. Plaintiff denied any right shoulder complaints prior to February 1, 2007. According to plaintiff, Dr. Bansal attempted more therapy and then referred plaintiff to Dr. Rodney Herrin.

¶ 12 Beginning March 15, 2007, plaintiff sought medical care from Dr. Herrin for his right shoulder. Plaintiff testified he gave Dr. Herrin a complete history (from the date of his first accident in January 2007) and complained of problems with his neck, right shoulder, and lower back.

¶ 13 After the February 2007 accident, plaintiff also saw Dr. Joseph Williams in connection with his cervical spine. Plaintiff stated, during the time he saw Dr. Williams, he experienced a burning sensation in his neck, had problems holding his neck up, the rotation in his neck was limited at times, and he had difficulty finding a comfortable spot to sleep in at night. With respect to his neck complaints, plaintiff recalled having "some small issues" as a result of his January 2007 accident but stated they were "very, very minute compared to what they were" after his February 2007 accident.

¶ 14 At trial, plaintiff submitted an exhibit containing his medical bills. Additionally, certain emergency room records from Memorial Medical Center were admitted into evidence; however, those records to not appear in the record on appeal. No other medical records were admitted into evidence at the bench trial. Defendant raised foundational objections to Dr. Bansal's records, asserting there was "no evidence deposition for Dr. Bansal" and "no evidence

for this Court to determine how [Dr. Bansal's records] are even relevant." However, the trial court did not rule on defendant's objection as plaintiff's attorney stated he would "withdraw Dr. Bansal's records, because there's no way for me to resolve these questions because Dr. Bansal has left the state, and we can't locate him."

¶ 15 Plaintiff did submit the evidence depositions of three of his treating doctors, Dr. Herrin, Dr. Williams, and Dr. Trudeau, and those depositions were admitted in full at trial. Dr. Herrin testified he was board certified in orthopedic surgery and his treatment of plaintiff was confined to the right shoulder. When Dr. Herrin first saw plaintiff on March 15, 2007, plaintiff reported he was in a motor vehicle accident on February 1, 2007, and his vehicle had been struck on the passenger side. Plaintiff reported shoulder pain that became progressively worse with stiffness and popping. He associated the onset of his problems with his February 2007 accident and denied having any previous issues with the shoulder.

¶ 16 Initially, Dr. Herrin assessed plaintiff as being "status post injury to the right shoulder" and recommended conservative treatment. On September 27, 2007, they discussed the possibility of arthroscopic surgery. Dr. Herrin testified, at that point, it had been determined plaintiff was not a candidate for neck surgery, he had continued shoulder symptoms, and had failed conservative treatment. On October 26, 2007, Dr. Herrin performed surgery on plaintiff's right shoulder and found plaintiff had a torn superior labrum and a small tear of the anterior labrum. Dr. Herrin described the labrum as the tissue that surrounds the socket. He opined his surgical findings were related to the accident history plaintiff provided. He also identified plaintiff's injury as a type III SLAP lesion, noting SLAP stood for superior labrum from anterior to posterior. On April 28, 2008, he placed plaintiff at maximum medical improvement and found

he could use his right upper extremity as tolerated. Plaintiff testified, at that point, he could use his shoulder a lot more than in previous months but he still was not at 100%.

¶ 17 Dr. Herrin provided his final diagnosis, testifying as follows:

> "Well, having reviewed this again my opinion would be that he'd injured his shoulder. In looking back I think he probably sustained injury to the superior labrum which was difficult to diagnosis [*sic*] because there's not a specific physical exam finding and [magnetic resonance imagings (MRIs)] don't always pick it up. And potentially injured the anterior inferior labrum as well as his AC joint.
>
> And so I think those injuries occurred with the accident. They were diagnosed subsequent to the arthroscopy. They were treated and I felt he had a good recovery. I wouldn't anticipate any long-term problems with his shoulder."

Dr. Herrin also testified the treatment he provided plaintiff was reasonable and necessary for the condition he suffered in the February 2007 accident. He opined plaintiff's shoulder condition was permanent but believed he would have good long-term function. Dr. Herrin additionally opined plaintiff's condition may have aggravated a preexisting condition in his AC joint. He did not believe the pathology found in the labral tears was preexisting and, instead, found those caused by the accident.

¶ 18 On cross-examination, Dr. Herrin testified that type III SLAP lesions were relatively uncommon but typically the result of trauma rather than degenerative in nature. He stated such an injury was usually "related to either some positioning that pinches *** the labrum

or causes it to tear or *** it can be impacted and cause it to tear." Dr. Herrin agreed that, typically, he would expect pain to be present at the time of the accident that caused the injury.

¶ 19 Defense counsel asked Dr. Herrin to review plaintiff's emergency room record from the February 2007 accident and he agreed it showed plaintiff had been restrained at the time of the accident and the accident was described as a low speed motor vehicle crash. The record also showed plaintiff complained of pain in his neck, low and mid back, left hip, and left rib. Dr. Herrin agreed the record gave no indication that plaintiff complained of shoulder pain. He was also asked to review the emergency room record from plaintiff's January 2007 accident. Dr. Herrin agreed that record showed plaintiff "complained of a tender type muscle spasm over his right shoulder blade area and pain with range of motion of neck to this area."

¶ 20 Dr. Herrin testified his opinion regarding the cause of plaintiff's shoulder injury was based on the history plaintiff provided. He further agreed that emergency room records created after each accident indicated pain in plaintiff's right shoulder was found only after the January 2007 accident. Dr. Herrin acknowledged his opinion at a previous deposition in June 2010, was that "whichever accident seemed to traumatize [plaintiff's] shoulder would be the cause of the problem." Finally, Dr. Herrin agreed plaintiff only told him about the February 2007 accident and had not mentioned the January 2007 accident.

¶ 21 On re-direct, Dr. Herrin was asked to review records from plaintiff's initial visit with Dr. Bansal following the February 2007 accident. He testified that record showed plaintiff reported "having considerable pain in his right shoulder and right ribs" and plaintiff thought "he jerked his arm during the accident." Dr. Herrin testified that was the type of injury that could result in the condition for which he treated plaintiff. He also stated it was his understanding that

Dr. Bansal recommended an MRI of plaintiff's right shoulder. Dr. Herrin was asked to review the MRI report, dated February 21, 2007, which he testified showed plaintiff had a history of "shoulder pain and difficulty with abduction since motor vehicle accident." Further, he testified Dr. Bansal's treatment with plaintiff after the January 2007 accident "would be relevant" and it was "hard to say" whether a SLAP lesion tear would result from a rear-end collision.

¶ 22 Finally, Dr. Herrin testified that, if plaintiff did not complain of a problem with his shoulder to Dr. Bansal after the first accident and did make such complaints after the second accident, his opinion would be that plaintiff's shoulder condition would be related to the second accident. However, he agreed that he did not review all of Dr. Bansal's records.

¶ 23 Dr. Williams, a board certified orthopedic surgeon, testified he first saw plaintiff on May 1, 2007, pursuant to a referral from Dr. Bansal. At that time, plaintiff complained of neck and mid-back pain. Also, he provided a history of both the January and February 2007 motor vehicle accidents. Dr. Williams testified X-rays were performed on plaintiff, showing "a significant amount of disk space narrowing" and what you would expect to see with cervical degenerative disk disease. He recommended an MRI of plaintiff's cervical spine, which was performed on May 10, 2007, and revealed "some degeneration within the spinal canal at C5-C6, C6-C7" with "foraminal stenosis bilaterally at both levels" and "what appeared to be a right paracentral disk herniation present at C6-C7." Dr. Williams diagnosed plaintiff with cervical radiculopathy, degenerative disk disease, axial neck pain, and low back pain. He testified, on June 5, 2007, a myelogram CT scan was performed on plaintiff, showing findings consistent with plaintiff's MRI. Specifically, the scan showed plaintiff had cervical degeneration at nearly every level and "moderate to severe spinal stenosis *** at C6-C7 with bilateral foraminal stenosis right

worse than left."

¶ 24 On January 8, 2008, Dr. Williams discussed surgery with plaintiff in the form of a multilevel anterior fusion. Plaintiff continued to follow up with Dr. Williams. On August 18, 2009, Dr. Williams determined plaintiff "seemed to be maintaining fairly well with minimal amounts of hydrocodone and participating with an occasional session of physical therapy." He testified, at that time, they decided to forgo surgical treatment and continue with observation and the current treatment course. However, Dr. Williams continued to believe surgery would be a reasonable treatment of plaintiff's condition.

¶ 25 Dr. Williams inconsistently testified both that he (1) recalled plaintiff was clear during his initial visit "that his pain was either non-existent prior to the [February 2007] accident or not as intense prior to the accident" and (2) could neither recall nor find in his dictation a report by plaintiff that his symptoms became more severe after the February 2007 accident. Regarding the cause of plaintiff's condition, Dr. Williams testified as follows:

> "I do not feel that the [February 2007] accident caused the degenerative changes within the axial neck that are seen on the MRI or the CT scan.
>
> Now whether or not it aggravated a pre-existing condition, that is a possibility but I would base that on his—his history."

Dr. Williams agreed that trauma could aggravate a preexisting degenerative condition and cause the condition to become symptomatic.

¶ 26 Dr. Williams testified he was aware plaintiff was involved in an accident in January 2007, but he was not aware of any specific complaints plaintiff had after that accident.

He did not review Dr. Bansal's records. However, based on a hypothetical that plaintiff suffered a cervical sprain as a result of the January 2007 accident and the February 2007 accident involved plaintiff being "slammed around inside at an impact when another vehicle struck and more or less T-boned the side of *** his pick-up truck," resulting in very severe neck pain, Dr. Williams opined plaintiff's February 2007 accident "could" have aggravated a chronic or degenerative condition. Dr. Williams testified he was unable to elaborate on how the accident could have aggravated plaintiff's spinal condition.

¶ 27 On cross-examination, Dr. Williams acknowledged he did not know plaintiff's condition prior to May 2007 and did not review any medical records that predated his February 2007 accident. At Dr. Williams's deposition, defendant's counsel presented a report from a CT scan that had been performed on plaintiff's cervical spine in September 2005. Dr. Williams reviewed that report and testified the 2005 scan showed degenerative changes at multiple levels of plaintiff's cervical spine. He agreed that many of his same findings had also been present on the 2005 CT scan.

¶ 28 Dr. Williams further testified he was unaware that plaintiff complained of neck pain after the January 2007 accident or that he underwent a CT scan of his cervical spine. He reviewed the report of a CT scan performed on January 4, 2007, the date of plaintiff's initial motor vehicle accident. Dr. Williams testified results from that scan showed multilevel degeneration with right-sided neural foraminal compromise that was worse at C6-C7.

¶ 29 Defense counsel next asked Dr. Williams to review medical records from Dr. Bansal, dated January 17 and 29, 2007. Dr. Williams testified the January 17 record showed plaintiff reported significant neck and back pain and pain with flexion and extension as well as

axial rotation to the left and right. He stated, on January 29, 2007, plaintiff continued to report significant pain and that any activity was extremely painful. Dr. Bansal's subjective findings included palpable neck area tenderness and pain with motion of the cervical spine. Dr. Williams agreed that it was possible plaintiff's preexisting degenerative cervical condition was not exacerbated by the February 2007 accident.

¶ 30 Dr. Trudeau testified he specialized in a combination of orthopedics and neurology. He saw plaintiff on June 26, 2007, pursuant to a referral from Dr. Williams. Plaintiff reported neck and arm pain and provided a history of being injured on February 1, 2007, in a motor vehicle accident. Plaintiff also reported having been in a previous motor vehicle accident but asserted he was not really having any difficulties in his neck and arms as of the date of the February 2007 accident. Following an examination, Dr. Trudeau determined plaintiff had nerve damage present on both sides of his neck.

¶ 31 Dr. Trudeau testified he also saw plaintiff on two occasions in 1996 with complaints of visual difficulties and pain in his back, neck, right knee, and right foot. On January 7, 1997, Dr. Trudeau diagnosed plaintiff with bilateral carpal tunnel syndrome.

¶ 32 Dr. Trudeau opined his objective findings were consistent with the history and complaints plaintiff reported. He reviewed plaintiff's records from Dr. Williams and Dr. Herrin. Based upon the information plaintiff provided and his review of Dr. Williams's records, he opined plaintiff's cervical spine injury was related to his February 2007 accident. Dr. Trudeau testified as follows:

> "So absent some other causative factors, none of which I have recorded or identified, it seems reasonable—within reasonable

medical certainty that the car accident that occurred 2-1-07 brought on this problem."

Dr. Trudeau further stated that, "even if a person has a pre-existing narrowing if they're hit from the back or the front or their neck goes back and forth it can bruise or contuse or irritate the nerve."

¶ 33 Dr. Trudeau acknowledged that he did not review any records regarding plaintiff's first accident or the medical treatment he received following that first accident. He also did not know what happened during that first accident and plaintiff did not describe it except to say something happened before but he was "pretty well over that and *** feeling fine" until the February 2007 accident. Finally, Dr. Trudeau testified he would "absolutely" defer to Dr. Williams's opinions, diagnosis, care, and treatment.

¶ 34 Plaintiff additionally testified, at the time of the bench trial, he continued to have difficulties with his right arm and experienced a burning sensation in his right shoulder. He also experienced difficulty with lifting and continued to experience soreness in his cervical area. He had trouble finding a good sleeping position and his range of motion was not 100%.

¶ 35 On cross-examination, plaintiff acknowledged he testified during his 2009 deposition that he only reported neck and mid-back complaints when first seeking emergency medical care after his February 2007 accident. However, plaintiff asserted he considered mid-back to include his shoulder areas. He further asserted that he immediately experienced shoulder pain after the February 2007 accident but agreed he did not notice the "clicking" in his shoulder "possibly until four days later."

¶ 36 On re-direct, plaintiff clarified that he sought emergency room care after his

accident and reported complaints in his left knee, ribs, neck, and mid-back. The pain in his neck that he was referring to was at "the ball of the neck, in between the shoulder blades." He testified the pain radiated to both of his shoulders.

¶ 37 On July 12, 2012, the trial court entered judgment in favor of defendant after finding plaintiff failed to meet his burden of proof with respect to proximate cause and damages. The court determined the impact of the February 2007 collision was minimal, noting Dr. Herrin's review of emergency room records showed the impact was described as low speed and plaintiff was restrained by a lap belt and shoulder harness. It found plaintiff made no immediate pain complaints to defendant after the February 2007 accident, emergency room records showed he did not make any right shoulder complaints immediately after the February 2007 accident, and he did have shoulder complaints immediately after the January 2007 accident. The court noted Dr. Herrin's testimony that "whatever accident traumatized the shoulder" was the cause of plaintiff's shoulder condition. It also pointed out that plaintiff did not provide a history of his January 2007 accident to Dr. Herrin.

¶ 38 With respect to plaintiff's cervical condition, the trial court noted Dr. Williams opined plaintiff's degenerative changes were not caused by the February 2007 accident and stated only that it was a "possibility" that the accident aggravated plaintiff's preexisting degenerative condition. The court noted Dr. Williams acknowledged that he did not review any of plaintiff's medical records which predated the February 2007 accident and which showed complaints of neck and back pain by plaintiff. The court did not reference Dr. Trudeau's testimony.

¶ 39 On August 10, 2012, plaintiff filed a posttrial motion for a new trial. On September 10, 2012, the trial court denied the motion.

¶ 40 This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 On appeal, plaintiff argues the trial court's judgment in favor of defendant was against the manifest weight of the evidence. He contends the evidence established both injury and damages as a result of the February 2007 accident.

¶ 43 "To recover damages based upon negligence, a plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injury." *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225, 938 N.E.2d 440, 446 (2010). "Questions regarding *** proximate cause of the injury are reserved for the trier of fact." *Krywin*, 238 Ill. 2d at 226, 938 N.E.2d at 447. "The term 'proximate cause' contains two elements: cause in fact and legal cause." *Krywin*, 238 Ill. 2d at 225-26, 938 N.E.2d at 446.

¶ 44 "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the plaintiff's injury." *Krywin*, 238 Ill. 2d at 226, 938 N.E.2d at 446-47. "[W]hen *** there are multiple factors that may have combined to cause the injury, we ask whether defendant's conduct was a material element and a substantial factor in bringing about the injury." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395, 821 N.E.2d 1099, 1127 (2004). "Conduct is a material element and a substantial factor if, absent the conduct, the injury would not have occurred." *Krywin*, 238 Ill. 2d at 226, 938 N.E.2d at 447. "As to legal cause, we assess foreseeability and consider 'whether the injury is of a type that a reasonable person would see as a likely result of his conduct.' " *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 397, 893 N.E.2d 303, 310 (2008) (quoting *City of Chicago*, 213 Ill.2d at 395, 821 N.E.2d at 1127).

¶ 45 "In a bench trial, it is the function of the trial judge to weigh the evidence and make findings of fact." *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 433, 581 N.E.2d 656, 660 (1991). On review, we "defer to the factual findings the court made in a bench trial to the extent those findings are not against the manifest weight of the evidence." *Upper Salt Fork Drainage District v. DiNovo*, 385 Ill. App. 3d 1083, 1097, 904 N.E.2d 84, 96 (2008). "A finding is against the manifest weight of the evidence only if the opposite finding is clearly evident, plain, and indisputable from the evidence in the record." *DiNovo*, 385 Ill. App. 3d at 1097, 904 N.E.2d at 96. Additionally, because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses, the court's credibility determinations in a bench trial are subject to great deference and a reviewing court should not substitute its judgment for that of the trial court. *Samour, Inc. v. Board of Election Commissioners of City of Chicago*, 224 Ill. 2d 530, 548, 866 N.E.2d 137, 148 (2007).

¶ 46 Here, defendant admitted liability for the February 2007 accident but maintained plaintiff suffered no injury as a result of that accident. At trial, plaintiff attempted to establish the February 2007 accident caused injury to both his right shoulder and cervical spine. The trial court disagreed, finding plaintiff failed to establish proximate cause. The record contains support for the court's determination.

¶ 47 Initially, the trial court determined the impact of the collision was minimal, rejecting plaintiff's description of a "pretty hard" impact and being "slammed" or "tossed" around his truck. The court's finding was supported by defendant's testimony that the collision occurred while he was switching lanes and involved a "glancing impact" with his vehicle scraping down the side of plaintiff's vehicle. The court's decision was further supported by Dr. Herrin's

testimony that plaintiff's emergency room records described the collision as "low speed" and showed plaintiff was restrained with a lap belt and shoulder harness. The record contains support for the court's finding of a minimal impact collision and an opposite conclusion is not clearly evident from the record.

¶ 48 The record reflects the trial court also accurately described the medical evidence and its finding that such evidence failed to establish causation was supported by the record. Here, plaintiff testified he was involved in a rear-end collision in January 2007, approximately one month prior to his February 2007 accident. Immediately following the January 2007 accident, he reported "a tender type muscle spasm over his right shoulder blade area and pain with range of motion of neck to this area." In January 2007, plaintiff reported significant back and neck pain to Dr. Bansal and continued to complain of significant pain until at least January 29, 2007, only several days prior to his February 2007 accident. Plaintiff underwent physical therapy for his injuries and, while he failed to specify which shoulder was involved, he acknowledged that therapy included his shoulder.

¶ 49 Although Dr. Herrin initially opined plaintiff's right shoulder injury was caused by his February 2007 accident, his opinion was made with no knowledge of plaintiff's January 2007 accident or the medical treatment he received thereafter. Further, Dr. Herrin stated a shoulder injury such as plaintiff's was typically the result of trauma and he would expect pain to be present at the time of the injury. Dr. Herrin reviewed the emergency room records created after both accidents and testified those records indicated plaintiff felt immediate shoulder pain only after the January 2007 accident. He further opined "whichever accident seemed to traumatize [plaintiff's] shoulder would be the cause" of his shoulder problem.

¶ 50 Similarly, Although Dr. Williams and Dr. Trudeau had at least been aware of the January 2007 accident, neither was aware of the accident details or plaintiff's specific complaints following that accident. Neither doctor reviewed medical records predating plaintiff's February 2007 accident. Further, Dr. Williams clearly opined that the degenerative condition in plaintiff's cervical spine was unrelated to the February 2007 accident and stated only that it was "a possibility" that the accident had aggravated a preexisting condition. He also testified it was "possible" that plaintiff's preexisting cervical condition was *not* exacerbated by his February 2007 accident. Notably, Dr. Williams could not elaborate on how plaintiff's accident could have aggravated his cervical spine condition.

¶ 51 Dr. Trudeau's causation opinion was based on the absence of any other causative factor and plaintiff's report that, at the time of the February 2007 accident, he was "pretty well over" his previous accident and "feeling fine." As discussed, the record contradicts that history, showing plaintiff complained of significant back and neck pain following his January 2007 accident and made such complaints several days prior to his February 2007 accident. Also, Dr. Trudeau testified he would "absolutely" defer to Dr. Williams's opinions. Again, Dr. Williams testified it was possible plaintiff's cervical condition was not aggravated by the February 2007 accident.

¶ 52 Here, the medical opinion evidence failed to show to a reasonable degree of medical certainty that defendant's acts caused plaintiff injury. Dr. Herrin's testimony on cross-examination demonstrated that the January 2007 accident could have been the cause of plaintiff's shoulder while Dr. Williams testified only that causation was a "possibility." Moreover, the record shows plaintiff's medical experts had little to no knowledge regarding his January 2007

accident, injuries, and treatment when initially forming their opinions, casting doubt on medical testimony connecting his condition to his February 2007 accident. Under the circumstances presented, the record supports the trial court's findings as to proximate cause and an opposite conclusion is not clearly evident. The court's decision was not against the manifest weight of the evidence.

¶ 53 Plaintiff also argues that, even assuming his shoulder injury was not related to the February 2007 accident, it is inarguable that he sustained damages that were proximately caused by defendant because the evidence established (1) he began to feel pain after the accident, (2) he was taken to the hospital by ambulance and received emergency medical care, and (3) treatment associated with ambulance transport and emergency medical care amounted to $3,015.90. We disagree.

¶ 54 In *Tipsword v. Johnson*, 59 Ill. App. 3d 834, 835, 376 N.E.2d 85, 86 (1978), the plaintiffs "appeal[ed] a jury verdict which found the defendant *** negligent but awarded plaintiffs no damages for medical expenses and alleged injuries arising from an automobile collision." On appeal, this court found the plaintiffs entitled to at least "some damages" based on the initial medical assistance the plaintiffs received. *Tipsword*, 59 Ill. App. 3d at 837, 376 N.E.2d at 87-88. We noted the case "undeniably" involved "an impact of substantial force," plaintiffs experienced pain after impact, plaintiffs immediately sought medical assistance, and each plaintiff incurred expenses for the treatment received. *Tipsword*, 59 Ill. App. 3d at 837, 376 N.E.2d at 87. We held that an impact between vehicles like the one in that case, involving substantial force, clearly justified the plaintiffs' decision to seek medical assistance following the collision. *Tipsword*, 59 Ill. App. 3d at 837, 376 N.E.2d at 87. There, evidence showed the

accident at issue involved a rear-end collision with an impact that "pushed plaintiffs' vehicle off the pavement." *Tipsword*, 59 Ill. App. 3d at 835, 376 N.E.2d at 86.

¶ 55 The facts of this case are distinguishable from *Tipsword*. Here, the trial court clearly determined the parties' collision involved only *minimal* impact. As discussed, that finding was sufficiently supported by the record. Plaintiff's entitlement to damages as a result of the February 2007 accident was a question of fact for the court. Under the circumstances presented, the court's award of no damages was not against the manifest weight of the evidence.

¶ 56 On appeal, plaintiff next argues the trial court erred in considering prior injury evidence relative to the January 2007 accident in the absence of expert medical testimony. To support his position, plaintiff cites *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 52, 733 N.E.2d 1275, 1276 (2000), involving a motor vehicle accident in which the plaintiff claimed neck and back injuries. In that case, the plaintiff sought to bar and the defendant sought to introduce evidence that the plaintiff had suffered an injury to his lower back approximately five years before the accident at issue in the case. *Voykin*, 192 Ill. 2d at 52, 733 N.E.2d at 1276. The trial court allowed the defendant to present evidence regarding the plaintiff's prior injuries and treatment and, ultimately, the plaintiff sought a new trial on the basis that the "defendant should not have been permitted to introduce evidence of *** prior injury without providing expert testimony to demonstrate a causal connection between the past and present injuries." *Voykin*, 192 Ill. 2d at 52, 733 N.E.2d at 1276-77.

¶ 57 The supreme court considered the issue on review and initially held a defendant is required to demonstrate a causal relationship between a prior and present injury and such requirement does not shift the ultimate burden of proof and "simply requires a defendant

demonstrate that the evidence he wishes to present is relevant to the question at issue, *viz.*, whether the defendant's negligence caused the plaintiff's injury." *Voykin*, 192 Ill. 2d at 56, 733 N.E.2d at 1279. Regarding the necessity of expert testimony to demonstrate causation, the court stated as follows:

> "Without question, the human body is complex. A prior foot injury could be causally related to a current back injury, yet a prior injury to the same part of the back may not affect a current back injury. In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." *Voykin*, 192 Ill. 2d at 59, 733 N.E.2d at 1280.

¶ 58 In the case before it, the supreme court determined the trial court erred by allowing the defendant to present evidence of the plaintiff's prior "neck problems" because (1) the evidence did not demonstrate what the plaintiff's "neck problems" were, (2) when the plaintiff suffered "neck problems," or (3) the last occasion the plaintiff suffered those symptoms. *Voykin*, 192 Ill. 2d at 60, 733 N.E.2d at 1281. The court further stated as follows:

> "Nothing about the evidence presented by defendant has any tendency to make it less likely that defendant caused plaintiff's neck injury or that defendant caused plaintiff to suffer damages. Without expert testimony establishing both the nature of plaintiff's prior 'neck problems' as well as the relationship between those prior problems and plaintiff's current claim, an average juror could not readily appraise the effect of the prior problems upon plaintiff's current claim. Consequently, this evidence should have been excluded." *Voykin*, 192 Ill. 2d at 60, 733 N.E.2d at 1281.

¶ 59 Here, *Voykin* does not warrant the exclusion of prior injury evidence since it is distinguishable in several respects from the case at bar. Initially, plaintiff did not object at trial to the prior injury evidence and, in fact, introduced evidence of his January 2007 accident, injuries, and treatment through both his own testimony and through the questioning of his medical experts. Thus, he cannot now claim its consideration by the trial court was error. See *Snelson v. Kamm*, 204 Ill. 2d 1, 24-25, 787 N.E.2d 796, 809 (2003) (holding evidentiary issues are forfeited on appeal where a party fails to first raise objections with the trial court). Further, in this case, defendant presented evidence demonstrating the relevance of prior injury evidence to causation

through his questioning of plaintiff's experts. Presentation of defendant's own medical experts was unnecessary where his cross-examination of plaintiff's experts resulted in evidence from which the court could find a relationship between plaintiff's injuries and his prior accident.

¶ 60 Additionally, unlike in *Voykin*, the evidence presented here established the nature of plaintiff's prior injuries, when they occurred, and when plaintiff last suffered symptoms prior to his February 2007 accident. The vast majority of prior injury evidence presented at trial concerned plaintiff's January 2007 accident which occurred approximately one month before the accident at issue at trial. Under these circumstances, the trial court committed no error.

¶ 61 Finally, on appeal plaintiff argues the trial court erred in excluding Dr. Bansal's medical records. However, the trial court did not order Dr. Bansal's medical records excluded. Although defendant objected to the records, the court did not have the opportunity to rule on the objection because plaintiff's attorney withdrew the exhibit containing those records. Thus, the court committed no error.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment.

¶ 64 Affirmed.